THE YALE LAW JOURNAL

Making Up for Lost Time: A Bright-Line Rule for Equitable Tolling in Immigration Cases

INTRODUCTION

In March 2008, the Seventh Circuit upheld the denial of a motion to reopen an asylum case that had been filed sixteen days late.[1] The appellant, Yuan Gao, claimed his delay was due to ineffective assistance of counsel. Yuan Gao, who feared that he would be persecuted for his religious faith if removed to China, alleged that his immigration attorney had "misrepresented his intentions" when she withdrew his asylum request and agreed to voluntary departure during an immigration court hearing.[2] After spending one month trying to contact his original attorney, Yuan Gao hired a new lawyer.[3] Invoking the doctrine of equitable tolling, he asserted that the fruitless month he spent attempting to contact his attorney should not have counted toward the ninety-day filing deadline for motions to reopen.[4] The Seventh Circuit rejected his argument on the grounds that equitable tolling "does not reset the clock."[5]

The Seventh Circuit's decision in *Yuan Gao v. Mukasey* contributed to an existing circuit split over the impact of equitable tolling on many

1. *See* Yuan Gao v. Mukasey, 519 F.3d 376, 378 (7th Cir. 2008).
2. *See* Brief and Required Short Appendix of Petitioner at 5-9, *Yuan Gao*, 519 F.3d 376 (No. 06-4431); Brief for Respondent at 6-8, *Yuan Gao*, 519 F.3d 376 (No. 06-4431).
3. Brief and Required Short Appendix of Petitioner, *supra* note 2, at 9. According to the petitioner's brief, Yuan Gao only realized the misrepresentation of his intentions after his new counsel explained the hearing decision in Chinese. *Id.* Yuan Gao filed the motion "on the 106th day, which was the 75th or 76th day after the petitioner discovered that he had a ground for filing a petition to reopen." *Yuan Gao*, 519 F.3d at 379.
4. *See* Brief and Required Short Appendix of Petitioner, *supra* note 2, at 22-24.
5. *Yuan Gao*, 519 F.3d at 378.

nonjurisdictional filing deadlines.[6] The Ninth and Eleventh Circuits have held that the filing period should freeze during the equitable tolling period.[7] Under this approach, Yuan Gao's clock would not have started running until Day 30, when he retained new counsel, and he would have had ninety days from that point forward to file his motion to reopen. The Seventh Circuit in *Yuan Gao*, however, endorsed a "reasonableness" standard,[8] which the Sixth and Eighth Circuits have also applied in employment discrimination cases.[9] For those courts, the movant must reasonably try to file the motion within the original time window, even if he has an equitable tolling claim.

This Comment argues that courts should adopt the minority "frozen clock" approach in the immigration context. The filing period for motions to reopen and to reconsider should restart only after the immigrant regains the ability to file such a motion.[10] Part I briefly overviews equitable tolling and explores why courts have differed when forming equitable tolling standards. Part II discusses how the Seventh Circuit in *Yuan Gao* erroneously analogized the asylum context to the employment discrimination context when determining its equitable tolling standard. Finally, Part III argues that the bright-line frozen clock rule has several advantages: it reduces uncertainty about the time window, promotes horizontal fairness across respondents, and ensures that every petitioner has the benefit of a full filing period.

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6. Jurisdictional deadlines, including those specifying the timing of judicial review, cannot be equitably tolled. *See* Stone v. INS, 514 U.S. 386, 405 (1995); Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 143 (2006). A statute of limitations, however, "provides an affirmative defense and is not jurisdictional. Statutes of limitations may thus be waived or excused by rules, such as equitable tolling, that alleviate hardship and unfairness." Bowles v. Russell, 127 S. Ct. 2360, 2369 (2007) (citations omitted).

7. *See* Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005); Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc).

8. *See* 519 F.3d 376.

9. Amini v. Oberlin Coll., 259 F.3d 493 (6th Cir. 2001); Dring v. McDonnell Douglas Corp., 58 F.3d 1323 (8th Cir. 1995).

10. Both motions are filed with the immigration court unless the Board of Immigration Appeals has jurisdiction because the appeal has been decided. *See* ROBERT C. DIVINE, IMMIGRATION PRACTICE § 11-7, at 11-97 (2008-2009 ed. 2008). "A motion to reopen presents new facts bearing on the decision to remove the alien, while a motion to reconsider points to errors in that decision." Johnson v. Mukasey, 546 F.3d 403, 404 (7th Cir. 2008). This Comment does not discuss deadlines for appealing immigration decisions to the federal courts of appeals, which cannot be tolled. *See supra* note 6. While this Comment focuses on motions to reopen and to reconsider, the arguments presented can be applied to *all* nonjurisdictional deadlines in the immigration context – including other filing and appeal deadlines that do not "govern the transition from one court (or other tribunal) to another." Joshi v. Ashcroft, 389 F.3d 732, 734 (7th Cir. 2004).

I. EQUITABLE TOLLING AND THE CIRCUIT SPLIT

Filing deadlines govern a huge swath of civil claims, ranging from discrimination under Title VII of the Civil Rights Act of 1964 to habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[11] For these claims, plaintiffs must file within a prescribed time window, or risk forfeiting their claims forever. Exceptions have been made when deadlines would collide with the interests of justice. Courts created the doctrine of equitable tolling by recognizing that a plaintiff should be granted "additional time within which to sue (or meet some other deadline) if even diligent efforts on his part would not have enabled him to prepare and file his suit within the statutory period."[12] Statutes of limitations have been equitably tolled for a variety of reasons, including fraud,[13] ineffective assistance of counsel,[14] and mental incapacity.[15]

The courts of appeals are split over when and how to apply equitable tolling. Three main justifications have been offered in support of the reasonableness standard, which inquires whether a respondent could reasonably be expected to file within the original time window. First, fairness dictates that the defendant should not be left in legal limbo past the filing deadline. According to the Seventh Circuit, statutes of limitations "protect important social interests in certainty, accuracy, and repose" and prevent private employers from being exposed to an extended period of liability.[16] Second, equitable tolling "is an exception to the rule, and should therefore be used only in exceptional circumstances."[17] Finally, the circuits have criticized plaintiffs who wait months to file their claims and then try to invoke equitable tolling.[18]

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11. *See, e.g.*, Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005) (AEDPA); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (Title VII).

12. Lewis v. City of Chicago, 528 F.3d 488, 493 (7th Cir. 2008).

13. *See, e.g.*, Iavorski v. INS, 232 F.3d 124, 134 (2d Cir. 2000).

14. *See, e.g.*, Cekic v. INS, 435 F.3d 167, 170 (2d Cir. 2006); Mahmood v. Gonzales, 427 F.3d 248, 251-52 & 252 n.8 (3d Cir. 2005).

15. *See, e.g.*, Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999).

16. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990).

17. Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1330 (8th Cir. 1995).

18. *See* Amini v. Oberlin Coll., 259 F.3d 493, 501 (6th Cir. 2001); *Cada*, 920 F.2d at 452; *Dring*, 58 F.3d at 1331.

On the other side of the split, the Ninth and Eleventh Circuits have emphasized the plain meaning of tolling to endorse the bright-line approach.[19] "Tolling means just what it says—the clock is stopped while tolling is in effect."[20] Moreover, the Ninth Circuit argues, the reasonableness standard creates uncertainty because the parties cannot "calculate with some certainty" the new filing deadline after tolling.[21] Finally, application of the standard interferes with legislative dictates. Congress meant for plaintiffs to enjoy the full statute of limitations; courts should not decide that a truncated time window was nevertheless a reasonable enough filing period.[22]

II. PROBLEMS WITH THE EMPLOYMENT DISCRIMINATION ANALOGY

The Seventh Circuit in *Cada v. Baxter Healthcare Corp.*—an employment discrimination case—expressed two major objections to the frozen clock approach to equitable tolling: it is unfair toward private defendants and rewards slothful plaintiffs.[23] Neither of those concerns, however, applies to filing deadlines in the immigration context, which often involves foreign-born respondents and highly legalistic proceedings. In *Yuan Gao*, the court applied the *Cada* reasonableness standard for equitable tolling without explaining why immigration cases should be subject to the same rule as employment discrimination cases.[24]

A. The Fairness to Defendants Argument in Cada

The *Cada* court emphasized the importance of being fair to the defendant when determining an equitable tolling standard.[25] In *Cada*, the defendant was a private healthcare corporation. In the immigration context, however, the opposing party is the federal government, and the fairness consideration is not as strong. Unlike a private party, the government will not suffer lost profits or

19. *See* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1156 (11th Cir. 2005); Socop-Gonzalez v. INS, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc).

20. Knight v. Schofield, 292 F.3d 709, 712 (11th Cir. 2002).

21. *Socop-Gonzalez*, 272 F.3d at 1195.

22. *Id.* at 1196.

23. 920 F.2d 446; *see supra* Part I and note 18.

24. Yuan Gao v. Mukasey, 519 F.3d 376, 378 (7th Cir. 2008). Furthermore, the court made no attempt to distinguish the Ninth Circuit case *Socop-Gonzalez*, 272 F.3d 1176.

25. *Cada*, 920 F.2d at 453.

accumulate back pay. The government can also rely on career attorneys rather than hire outside counsel.[26]

Despite these differences, the federal government's substantial burdens in handling immigration cases should not be understated. The huge backlog of naturalization applications[27] and the heavy costs associated with a vigorous policy of deporting undocumented individuals have been well chronicled.[28] The government arguably could face higher costs if strict filing deadlines were altered under the frozen clock rule advocated in this Comment. Moreover, any rule allowing the extension of filing dates could stymie congressional efforts to streamline the deportation of undocumented immigrants.[29]

Notwithstanding these burdens on the government, fairness considerations still weigh in favor of the respondent noncitizens. Justice Blackmun, dissenting in *Ardestani v. INS*, pointed out that "the stakes for the alien involved in deportation proceedings—particularly in asylum cases—are enormous."[30] Deportation may result "in loss of both property and life[,] or of all that makes life worth living."[31] In recent years, the government has erected significant obstacles for respondents to challenge their removal proceedings. Federal laws have restricted judicial review of removal orders, and additional regulations have weakened the administrative appeals process.[32] The reasonableness

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26. *See* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 559-60 (2003) (pointing out that Congress created the Department of Justice in part because employing government lawyers "would be less expensive than relying on outside counsel").

27. *See, e.g.*, Karin Brulliard, *In D.C. Area, Citizenship Test Is One of Patience: Local Immigrants Face Longest Wait*, WASH. POST, May 3, 2008, at B1.

28. *See, e.g.*, Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1.

29. Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, AEDPA, and the REAL ID Act of 2005 have restricted or, in some contexts, eliminated judicial review of removal orders. *See* Eric M. Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2023 (2008); Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1369 (2006).

30. 502 U.S. 129, 147 (1991) (Blackmun, J., dissenting).

31. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see* Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

32. *See* David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1149 (2007) ("[S]treamlining regulations adopted in August 2002 weakened the system of internal administrative review of immigration judge decisions by the Board of Immigration

standard for equitable tolling could further erode the respondent's opportunity to challenge an unfavorable ruling.

B. The Longer Filing Deadline in Cada

The *Cada* court had little sympathy for a complainant who waited almost eight months to file his age discrimination claim. Yuan Gao, however, only had a ninety-day deadline.[33] Instead of recognizing the shorter timeframe for filing motions to reopen immigration cases, the *Yuan Gao* court analogized to a hypothetical case with a "10-year statute of limitations for a suit on a written contract" to illustrate how the frozen clock approach might leave the defendant "on tenterhooks for 20 years."[34] The court's use of this hypothetical is puzzling because the filing deadlines in *Yuan Gao* and *Cada* were not remotely close to ten years in length. Freezing the clock may push some filing dates back weeks or even months in immigration cases, but the government will never face ten-year delays.

C. The Complexity of the Immigration Process

The Seventh Circuit's unexplained assumption that the same standard should apply to both immigration and employment discrimination cases is inappropriate because the two proceedings differ in several respects. Unlike employment discrimination cases, asylum applications and removal proceedings go through a complicated legal process. For example, a noncitizen in removal proceedings must file his asylum application before an administrative immigration judge, who determines the merits of the claim in a later hearing.[35] On the other hand, a noncitizen who is legally present in the United States must file his asylum application before an asylum officer, who

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Appeals (BIA), decreasing the BIA's size by over half, making disposition of appeals by a single BIA member (rather than a panel of three) the norm, and encouraging the issuance of opinions without analysis of the claims.").

33. *See* 8 C.F.R. § 1003.2(c)(2) (2008) (governing motions before the Board of Immigration Appeals); 8 C.F.R. § 1003.23(b)(1) (governing motions before the Immigration Court). For certain removal orders, plaintiffs have 180 days to move to reopen. *See* 8 C.F.R. §§ 1003.23(b)(4)(i)-(ii). For motions to reconsider, the deadline is thirty days after the mailing of the administrative order. *See* 8 C.F.R. § 1003.2(b)(2) (governing motions before the Board of Immigration Appeals); 8 C.F.R. § 1003.23(b)(1) (governing motions before the Immigration Court).

34. 519 F.3d 376, 378-79 (7th Cir. 2008).

35. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 415, 419-20 (10th ed. 2006).

may refer the claim to an immigration judge.[36] Noncitizens may appeal denials of asylum applications to the Board of Immigration Appeals, the U.S. Courts of Appeals, and the Supreme Court.[37] They can also file motions to reopen and reconsider with the immigration judge. The Supreme Court has noted,

> An alien facing deportation generally is unfamiliar with the arcane system of immigration law, is often unskilled in the English language, and sometimes is uneducated; for these reasons, "deportation hearings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel."[38]

Nonetheless, many respondents navigate this system pro se.[39]

In comparison, the procedure for preserving an employment discrimination claim is simpler. The prospective plaintiff files a complaint with the Equal Employment Opportunity Commission (EEOC),[40] which takes on the responsibility of conducting an investigation.[41] The complainant can choose to file a lawsuit at the end of the administrative process.[42] In *Cada*, the Seventh Circuit noted that "we are speaking not of a judicial complaint, but of an

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36. *See id.* at 408-12.

37. *See id.* at 847-999.

38. Ardestani v. INS, 502 U.S. 129, 146 (1991) (quoting Escobar Ruiz v. INS, 838 F.2d 1020, 1026 (9th Cir. 1988) (en banc)); *see also* Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005) (affirming a motion to reopen filed almost nine months late in part because the respondent "is a foreigner who may, therefore, have more than the average difficulty in negotiating the shoals of American law").

39. *See* Larry R. Fleurantin, *Immigration Law: Nowhere To Turn—Illegal Aliens Cannot Use the Freedom of Information Act as a Discovery Tool To Fight Unfair Removal Hearings*, 16 CARDOZO J. INT'L & COMP. L. 155, 158 (2008) ("Between 2001 and 2005, over 50% of immigrants appeared *pro se* in removal proceedings within the nation's 54 Immigration Courts. According to the Catholic Legal Immigration Network, in 2003, nearly 40% of immigrants who hired attorneys prevailed on the merits of their cases as compared to only 14% of the *pro se* immigrants.").

40. The EEOC's enforcement mechanisms and filing deadlines differ in some respects depending on which statute was allegedly violated, but the charge-filing process is similar. *See* Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1153 (2008); EEOC, Filing a Charge of Employment Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html (last visited Jan. 30, 2009).

41. *See* Jamie Goetz, Comment, *Whose Opinion Really Matters? Admitting EEOC Reasonable Cause Determinations as Evidence of Discrimination*, 76 U. CIN. L. REV. 995, 996-98 (2008).

42. *Id.* at 998.

administrative complaint."[43] The written charge has few content requirements,[44] and "even if a charge fails to contain the specified information, it may still be sufficient, provided it is 'a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'"[45] The *Yuan Gao* court also argued that the motion to reopen itself is not difficult to compose;[46] nevertheless, the motion must be understood in the wider context of a complex legal regime populated by pro se immigrants.[47]

III. IN SUPPORT OF A BRIGHT-LINE "FROZEN CLOCK" RULE

The bright-line rule advocated in this Comment is grounded in the simple premise that every respondent in an immigration proceeding deserves the full statutory filing period to assert his claims. The reasonableness standard introduces additional ambiguity and subjectivity into the process by allowing the effective filing period to vary with each appellate panel. This uncertainty may adversely impact the respondent in immigration cases by exerting additional pressure and hindering his ability to retain adequate legal representation.

Equitable tolling applies in situations where the blameless respondent applies his best efforts but still cannot meet the filing deadline. For Yuan Gao, whose first month was allegedly lost, the filing window was effectively sixty days. Under the reasonableness standard, a judge was required to decide whether the remaining two months provided Yuan Gao sufficient time to file his motion to reopen. Horizontal fairness across respondents under this system is impossible: the effective time window for each respondent varies depending on the judicial panel. A frozen clock rule would ensure that respondents always receive the full filing time. In the case of motions to reopen, each respondent

43. 920 F.2d 446, 452 (7th Cir. 1990).

44. *See* 29 C.F.R. §§ 1601.6-.9, 1626.6-.8 (2008); Goetz, *supra* note 41, at 996-97; *see also Cada*, 920 F.2d at 452 ("Cada could have prepared an adequate administrative complaint within days.").

45. Jones v. United Parcel Serv., Inc., 502 F.3d 1176, 1184 (10th Cir. 2007) (quoting 29 C.F.R. § 1601.12(b) (2007)); *see also* 29 C.F.R. § 1626.8(b) (2008) (stating the requirement for age discrimination).

46. 519 F.3d 376, 379 (7th Cir. 2008).

47. *See* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 7-10 (2008).

would be guaranteed an effective ninety days, ensuring uniformity across cases[48] and minimizing judicial discretion.

Some uncertainty will inherently exist in these situations because the judge ultimately decides whether the deadline was tolled and for how long. But this subjective determination is unavoidable. Under the reasonableness standard, judges acquire an estimate of how long the respondent could not file for reasons beyond his control and then weigh the adequacy of the remaining time. The bright-line rule eliminates this second step and keeps uncertainty to a minimum. Rather than trying to determine how much time is "reasonable," judges would just add on the balance of the filing period. This rule conforms to the Supreme Court's understanding of equitable tolling: "Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped."[49]

The uncertainty of the *Cada* standard could also hurt respondents in their search for adequate counsel. Whenever a respondent hires a new attorney after part of the filing deadline has elapsed, the lawyer cannot be certain whether to rush to meet the original deadline. Is one month a "reasonable" amount of time? Or two months? In a case involving an untimely Federal Employers' Liability Act claim, the Supreme Court pointed out that to "toll the federal statute for a 'reasonable time' . . . would create uncertainty as to exactly when the limitation period again begins to run."[50] The reasonableness standard "promotes inconsistency of application and uncertainty of calculation."[51] Busy attorneys juggling many clients might be reluctant to take cases midstream because they might not have the full time period to file.[52]

Importantly, the bright-line rule is a modest one. The window would still be ninety *effective* days to file a motion to reopen. The equitable tolling doctrine

48. *See Yuan Gao*, 519 F.3d at 378.

49. United States v. Ibarra, 502 U.S. 1, 4 n.2 (1991). While the plain meaning of the above definition endorses the bright-line rule, the Court cited *Cada* in the same footnote. Later Court decisions have also cited *Cada*, usually for its discussion of the various tolling doctrines. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 753 (2008); Klehr v. A.O. Smith Corp., 521 U.S. 179, 192 (1997).

50. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 435 (1965).

51. Socop-Gonzalez v. INS, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc).

52. The Seventh Circuit suggested that Yuan Gao's lawyer could have asked for an extension, but the court went on to recognize that "it is unclear whether the immigration judge could have given him one; and, if not, his only recourse may indeed have been to plead equitable tolling." *Yuan Gao*, 519 F.3d at 378.

is also self-regulating because it is only available to respondents who cannot meet the filing deadline "despite all due diligence."[53] Charlatans and sloths whose motive is delay cannot hide behind the doctrine. Furthermore, certain provisions of the Immigration and Nationality Act ensure that the frozen clock approach would not undermine legitimate immigration enforcement efforts. First, the law limits respondents to one motion to reconsider and one motion to reopen.[54] Second, filing a motion to reopen generally does not stay the execution of an immigration judge's final order, including an order of removal.[55] While the rule might lead to an increase in the total number of timely filed motions, there is no reason to believe that these additional motions will be frivolous. Since the harm to the government is minimal,[56] the cost-benefit analysis weighs in favor of the bright-line rule even if it only captures a few additional meritorious motions.[57]

CONCLUSION

In *Yuan Gao*, the Seventh Circuit transplanted the reasonableness standard for equitable tolling into the immigration context, even though *Cada*'s concerns from the employment discrimination context were not present in the immigration context. The frozen clock approach to equitable tolling better serves the important interests of immigration respondents. This bright-line rule would enhance certainty about due dates, impose low costs on the government, and provide respondents the benefit of the full filing period. Respondents deserve no less considering the high stakes involved in immigration cases.

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53. *Socop-Gonzalez*, 272 F.3d at 1193; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990). This requirement would prevent excessively long tolling periods—respondents will have a difficult time proving constant "due diligence" in the many months or years after the expiration of a deadline.

54. *See* 8 U.S.C. § 1229a(c)(6)(A)-(7)(A) (2000); 8 C.F.R. § 1003.23(b)(1) (2008).

55. *See* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v).

56. *See supra* Section II.A.

57. The analysis here is similar to the three-pronged test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The arguments outlined in this Comment may support the extension of the bright-line rule into other contexts beyond immigration when the same values are at stake.

THE YALE LAW JOURNAL

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